IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 158 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UNITED INDIA INSURANCE CO.LTD.

Versus

MINOR MAMTABEN B RATHOD -THRO'BYASSINGH BANSISINGH RATHOD

Appearance:

1. Appeal from Order No. 158 of 2003

MR PV NANAVATI with MR VIBHUTI NANAVATI for the appellant

MR NM KAPADIA for Respondent No. 1

RULE SERVED for Respondent No. 2

MR KK TRIVEDI for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 13/08/2004

ORAL JUDGEMENT

United India Insurance Company Limited, original defendant no.2 in Motor Accident Claim Petition No.37 of 2002 (hereinafter referred to as "the claim petition") has approached this Court by way of this Appeal From Order being aggrieved of order dated 27.02.2003, below Exhibit 19.

2. The facts of the case are that, on 03.06.2001 an accident took place when a truck bearing registration No.GJ-5-V 3080 ran over a minor girl causing her severe injuries. The guardian of minor girl Mamtaben Byassingh Rathod filed, aforesaid claim petition under section 166 of the Motor Vehicles Act, 1988, before the Motor Accident Claim Tribunal (Main), Surat (hereinafter referred to as "the Tribunal") claiming compensation of Rs.3 lakhs, alleging that the truck in question was run in a rash and negligent manner by original opponent no.1, i.e. Anilbhai Chhanabhai Chowdhary.

The Insurance company after served with summons on 26.02.2002 appeared through an advocate. A Lok Adalat was organised on 21.04.2002 in the District Court at Surat. In that Lok Adalat, matter was settled, a compromise was entered into, between learned advocate of the minor-claimant and the advocate of the Insurance Company. An amount of Rs.1,95,000/-, was agreed to be paid, by way of compensation, to the claimant, by the Insurance Company with a condition that the Insurance Company would thereafter stand exonerated from all liabilities, even if the proceedings are further pursued against the owner and driver of the insured vehicle. The compromise was recorded by the Tribunal on 21.04.2002 and by order dated 22.04.2002 a decree was passed in terms of the compromise, to the effect that, 'the Insurance company is liable to pay Rs.1,95,000/-'. The Insurance Company was ordered to deposit, the said amount, within three months from the date of the order. It was also ordered that, in case the Insurance company fails to deposit the said amount within the stipulated time, the claimant would be entitled to receive interest at the rate of 9% till the amount is realised by the claimant. It was also provided that, on deposit of the amount, the Tribunal will pass necessary orders of disbursement.

3. The Insurance Company while verifying the compliance of section 64-VB of the Insurance Act, 1938, found that, the policy was, for the period from 04.04.2001 to 03.04.2002 and that the policy was the 'first policy' issued in favour of the insured. It was also found that, the insured had tendered proposal form on 03.04.2001 along with cheque dated 03.04.2001, drawn

on 'Surat Nagrik Cooperative Bank', Adajan Branch, by the insured-Valjibhai Keshavbhai Bharwad. When the said cheque was presented by the appellant-Insurance company, for collection, through its bankers, on 09.04.2001, the same was returned, on 11.04.2001, with an endorsement, "insufficient funds". Thus, the cheque, given by the insured owner (original opponent no.2) of vehicle bearing registration no.GJ-5-V 3080 was dishonoured. The Insurance Company, therefore, field an application-Exhibit 19, setting out all these facts and contending that, there was no compliance of section 64-VB of the Insurance Act, 1938. It is also contended by the Insurance Company that, on dishonour of the cheque on 11.04.2001 an intimation was given, by Registered Post A.D. letter on 12.04.2001 to the insured. But then the said Registered Post A.D. letter was returned to the Insurance Company, by the Postal authorities with endorsements, "not found on 16, 17, and 18th April 2004" and "address is incomplete". This second endorsement did not bear any date. The Insurance Company prayed in this application (Exhibit 19), for cancellation of 'the compromise' entered into on 21.04.2002 in Lok Adalat and 'the award' made on the basis of the compromise.

4. The Tribunal rejected this application holding that the application, is in the form of a 'review application' for quashing and setting aside the award passed in a 'Lok Adalat', in view of the settled principles of law, governing Lok Adalats and the principles laid down in the cited case, whereby finality is attached to an award passed by the Lok Adalat. The Tribunal was of the opinion that such a finality cannot be permitted to be destroyed, particularly in view of the provisions of the Legal Services Authority Act, as it would result into defeating the very aim and object of the Act, for which it is enacted. The learned Judge has observed that,

> ".. .. Even assuming that this review application is tenable, then also as per the settled principles of law and in view of the principles enunciated in the cited case, Insurance Company cannot avoid its liability. In the present case, the matter is settled in Lok Adalat, and so, there is no scope of appeal or review in the matter under the provisions of Legal Services Authorities Act."

5. Mr.Nanavati, the learned advocate appearing for the appellant strenuously contended that though the matter was compromised before a Lok Adalat, the order was

passed by 'the Tribunal' and the award was also passed by 'the Tribunal' and therefore, it was open for the Insurance Company to press its application, Exhibit 19. The learned advocate submitted that, 'the Tribunal' has committed an error in dismissing the application.

6. Mr.Nanavati, the learned advocate in this regard relied upon a decision of the Honourable the Apex Court in the matter of National Insurance Co. Ltd. Vs. Seema Malhotra and others, reported in AIR 2001 SC 1197. The learned advocate submitted that the Honourable the Apex Court has held that,

> "Where under a contract of insurance the insured gave a cheque to the insurer towards the first premium amount, but the cheque was dishonoured by the darwee-bank due to insufficiency of funds in the account of the drawer, the insurer is not liable in such a situation to honour the claim, ... " (emphasis supplied)

7. He submitted that the Honourable the Apex Court has held that,

> ".. .. The essence of insurance business is coverage of risk by undertaking to indemnify the insured against loss or damage. Motivation of insurance business is that the premium would turn to be profit of business in case no damage occurs. But to ask insurance company to bear entire loss of damage of somebody else without receiving a pie towards premium is contrary to principles of equity, ..."

8. The learned advocate submitted that the Honourable the Apex Court has also held that,

> "The insurer has no liability to the insured unless and until the premium payable is received by Insurer. In a contract of insurance when an insurer gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise. The drawer of the cheque promises the insurer that the cheque, on presentation, would yield the amount in cash. It cannot be forgotten that a cheque is a Bill of Exchange drawn on a specified banker. A Bill of Exchange is an instrument in writing containing an unconditional order directing a certain person to pay a certain sum of money to a certain

person. It involves a promise that such money would be paid. Thus, when the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned the insurer need not perform his part of the promise. The corollary is that the insured cannot claim performance from the insurer in such a situation." (emphasis supplied)

9. The learned advocate also pointed out that the Honourable the Apex Court has further held that,

"Further under S.25 of the Contract Act an agreement made without consideration is void. Section 65 of the Contract Act says that when a contract becomes void any person who has received any advantage under such contract is bound to restore it to the person from whom he received it. So even if the insurer has disbursed the amount covered by the policy to the insured before the cheque was returned dishonoured, insurer is entitled to get the money back. However, if the insured makes up premium even after cheque was dishonoured but before date of accident it would be a different case as payment of consideration can be treated as paid in the order in which the nature of transaction required it." (emphasis supplied)

10. As against that the learned advocate, Mr.K.K. Trivedi appearing for respondent no.3-owner supported the order passed by the Tribunal dated 27.02.2003, referring to section 89 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") which provides for, 'settlement of disputes outside the Court'. He submitted that, 'where a dispute has been referred to Lok Adalat provisions of subsection (1) of section 20 of the Legal Services Authority Act, 1987 are applicable and under the provisions of the Legal Services Authority Act a finality is attached to the award of Lok Adalat under subsection (2) of section 21 of the Act.

11. Mr.Kapadia, the learned advocate appearing for respondent no.1-original claimant submitted that in view of the two decisions of the Honourable the Apex Court which are directly applicable to the facts of this case and the issue involved in this matter, the aforesaid question is not required to be gone into. He submitted that, he does not waive/ give up his contention that the matter was settled before the Lok Adalat and therefore,

as submitted by Mr.Trivedi, the learned advocate for respondent no.3, a finality is attached to the award passed by the Lok Adalat. But then, as the issue is already decided by the Honourable the Apex Court this matter be disposed of on the same lines.

12. Mr.Kapadia, the learned advocate relied upon the following two decisions of the Honourable the Apex Court. One in the matter of Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and others, reported in (1998) 1 SCC 371 and the other in the case of New India Assurance Co. Ltd. Vs. Rula and others, reported in AIR 2000 SC 1082. Mr.Kapadia submitted that in fact the decision cited by Mr.Nanavati supports his case. He submitted that the Hon'ble the Apex Court has held that an Insurance Company is liable to compensate when it is matter of compensating a 'third party'.

13. Mr.Kapadia, the learned advocate submitted that the Honourable the Apex Court has held in the case of Oriental Insurance Co. Ltd., (1998) 1 SCC 371 (supra). The question was considered by the Honourbale the Apex Court by constituting a Bench of three Judges and the reason for this special exercise is set out in para 2 of the judgement, which reads as under:

> "This appeal is heard by a Bench of three Judges because learned counsel for the appellant, the Oriental Insurance Co. Ltd., had submitted that the decision of this Court in United India Insurance Co. Ltd. V. Ayeb Mohd. had been misread by the Motor Accident Claims Tribunal and the High Court and that, while the appellant would pay the amount of compensation awarded in this matter, it desired, in view of the general importance of the question, an authoritative pronouncement."

14. The Honourable the Apex Court has considered the provisions of section 64-VB of the Insurance Act in light of the provisions of section 147(5) and section 149(1) of the Motor Vehicles Act, 1988 and then held that,

> "We have, therefore, this position. Despite the bar created by section 64-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of Sections 147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the

liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured." (emphasis supplied)

15. Mr.Nanavati, the learned advocate appearing for the appellant-Insurance Company tried to distinguish the decision of the Honourable Apex Court on the facts, saying that in the case on hand there was no issuance of policy and therefore, the decision of the Honourable the Apex Court shall not be applicable to the case on hand. He, therefore, invited attention of this Court to the observations made, in para 12, of the decision of Oriental Insurance Co. Ltd., (1998) 1 SCC 371 (supra) which read as under:

" .. .. it was the appellant itself who was responsible for its predicament. It had issued the policy of insurance upon receipt only of a cheque towards the premium in contravention of the provisions of Section 64-VB of the Insurance Act. .. .." (emphasis supplied)

16. This Court is conscious of the fact that in the present case the Insurance Company did issue a receipt bearing the number of the policy. The underlying principle of the decision of the Honourable the Apex Court is that when an insurer 'holds out' to the public at large, that, it has entered into an agreement with the insured, this Court is of the opinion that sections 147(5) and 149(1) of the Motor Vehicles Act, 1988 will come into play, therefore, Insurance Company will be liable to compensate the third party in this case also. In fact, the Honourable the Apex Court has observed in the case of Oriental Insurance Company Limited, (1998) 1 SCC 371 (para 12) (supra) that:

".. .. The public interest that a policy of insurance serves must, clearly, prevail over the interest of the appellant."

and this cannot be missed sight of.

17. The learned advocate Mr.Kapadia submitted that the Honourable the Apex Court, in the matter of New India Assurance Co. Ltd., AIR 2000 SC 1082 (supra), has considered the question of applicability of section 64-VB

of the Insurance Act against the third party risks. He relied upon para 11 of the the said judgement, which reads as under:

> "This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non payment of premium would not affect the rights already accrued in favour of the third party." (emphasis supplied)

The learned advocate Mr.Nanavati for the appellant-Insurance Company tried to distinguish this decision of the Honourable the Apex Court also, on the ground that as the Insurance Company had not issued insurance policy, there is no question of cancelling the same on dishonour of the cheque. The fact that after the cheque was dishonoured and the Insurance Company sent an intimation of the same to the insured by Registered Post A.D. letter, which according to the Insurance Company was returned, by the Postal authorities, the Insurance Company has not cancelled the cover note, which was issued on receipt of cheque, wherein the policy number was mentioned. Therefore, as stated hereinabove, in the considered opinion of this Court the judgement squarely applies to the facts of the case and the Insurance Company cannot be heard saying that it is not liable to compensate the third party.

18. Mr.Kapadia, the learned advocate appearing for the claimant submitted that the decision of the Honourable the Apex Court in the matter of National Insurance Co. Ltd., AIR 2001 SC 1197 (supra), in fact helps the claimant and not the Insurance Company, so far as 'third party' is concerned. The learned advocate submitted that the only portion, which supports the case of the Insurance company is only referred to and relied upon by the learned advocate of the company. He submitted that in fact the Honourable the Apex Court has,

laid down in absolutely clear terms, that so far as 'third parties' are concerned, the Insurance Companies are liable on account of 'statutory provisions' in view of the 'initial agreement' entered into between the insured and the company concerned. The learned advocate for the claimant, rightly pointed out that the decision of the Honourable the Apex Court is in favour of the Insurance Company, only to the extent it relates to the claim of the 'insured'. But so far as the 'third party' is concerned, it was made clear before the Honourable the Apex Court, which is recorded by the Honourable the Apex Court in the matter of National Insurance Co. Ltd., AIR 2001 SC 1197 (supra). The relevant part reads as under:

> ".. .. To avoid confusion we may point out that the insurance company has no dispute that the claims, if any, made by the kith and kin of the insured for the injuries sustained by them in the accident including the claims made by the legal representatives of the deceased in such accident would also be treated as third party claims."

19. The learned advocate pointed out that in the opening para itself the Honourable the Apex Court has observed in the matter of National Insurance Co. Ltd., AIR 2001 SC 1197 (supra) that:

> ".. .. There is no dispute that the insurer is liable as against third parties because it is covered by the statutory provisions contained in Chapter X of the Motor Vehicles Act, 1988. .. .."

20. In view of the aforesaid discussion this Court finds no substance in the Appeal From Order filed by the Insurance Company and the same is dismissed with cost of Rs.3,500/-, (Rupees three thousand and five hundred only) which the Insurance Company shall deposit with the Motor Accident Claims Tribunal. On deposit of the same, it shall be paid to the claimants.

(Ravi R. Tripathi, J.)

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